United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1097

To be argued by
RICHARD W. BREWSTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1097

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT DI GIOVANNI and
MICHAEL SADOWSKI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
RICHARD W. BREWSTER,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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United States of America,

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—against—

Robert Di Giovanni and Michael Sadowski,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Robert Di Giovanni and Michael Sadowski appeal from judgments of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered February 20, 1976, convicting them, following jury trials, of bank robbery in violation of Title 18, United States Code, Section 2113 and Section 2.

Specifically, appellant Di Giovanni appeals from a conviction entered under Section 2213(a) following a four day jury trial ending on December 4, 1975 (the "first trial") relating to the robbery of a branch of the Atlas Federal Savings and Loan Association on July 18, 1975 (the "Atlas robbery") and a branch of the Chase Manhattan Bank on July 24, 1975 (the "Chase robbery"). Appellant Di Giovanni was convicted of both robberies.

Appellant Michael Sadowski was not a defendant in the two counts of the indictment which were the subject of the first trial.

Both Robert Di Giovanni and Michael Sadowski appeal from convictions entered under Section 2113(d) following a two week jury trial ending on January 2, 1976 (the "second trial"), relating to the robbery of a branch of the National Bank of North America on July 2, 1975 (the "NBNA robbery").[1]

On February 20, 1976, Robert Di Giovanni was sentenced to study and report pursuant ot Title 18, United States Code, Section 4208(b), and Michael Sadowski was sentenced to ten years imprisonment under Section 4208(a)(2). Following the study and report, on May 21, 1976, Robert Di Giovanni was sentenced to concurrent fifteen year prison terms under Section 4208(b)(2) for the three bank robberies of which he had been convicted.

Statement of the Case

1. The first trial

Immediately before the first trial, Robert Di Giovanni's co-defendants, Michael Grafman and Stanley Loskocinski, entered guilty pleas in satisfaction of the indictment, and appellant Di Giovanni was the only defendant on trial with respect to the Atlas and Chase robberies.

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[1] In the Government's brief references to the transcript of the trials will be made by reference to the transcript page of the respective trial; references to appellants' joint appendix will be preceded by the letters "JA" and references to the Government's appendix will be preceded by the letters "GA".

An employee from each of the two banks testified that two robbers wearing stocking masks carried out the robberies, with one robber vaulting over the tellers' counter and the second robber covering the customers' floor area with a handgun (39-48, 57-62).[1] In connection with the Atlas robbery, Robert Mengani, an officer of the bank, described a white Oldsmobile with Connecticut plates as the getaway car (46). In connection with the Chase robbery, Alice Kip, a customer, recalled that the getaway car used in that robbery was light in color (75) and had a white plate with dark lettering (76). By stipulation surveillance photographs of the Atlas robbery were received in evidence showing a masked robber with striped sneakers vaulting the tellers' counter (49). By a similar stipulation, a surveillance photo taken during the Chase robbery was received in evidence showing a masked robber behind the tellers' counter wearing a light colored sweatshirt; visible in this photograph, on the chest area of the sweatshirt, was a light emblem on a patch of dark background; printed in a curve over this dark patch was a partially readable word ending in the letters "TH" (72).

Following the testimony of bank employees and customers, Michael Grafman and Stanley Loskocinski testified. Grafman testified that he participated in both the Atlas and Chase robberies with Stanley Loskocinski and Robert Di Giovanni (89, 103). In each robbery Grafman testified that he and Robert Di Giovanni went into the bank wearing stocking masks (99, 107) and that Robert Di Giovanni went over the tellers' counter while Grafman

[1] In view of anticipated testimony that the handgun was unloaded in each of the two robberies, counts of the indictment charging violations of Section 2113(d) were severed on motion of the Government prior to trial and the first trial proceeded under Section 2113(a) alone.

covered the banking floor with an unloaded handgun (100, 108). In each case Stanley Loskocinski operated the getaway car (92, 104). Grafman also mentioned using bandaids on his fingertips in the Atlas robbery (94) and brown or green cloth work gloves in the Chase robbery (105) to avoid fingerprints. Finally, Grafman described dividing up the bank robbery proceeds from each robbery at the apartment of Di Giovanni and his girlfriend, Sonia (92, 102, 109).

Stanley Loskocinski then described his participation with Grafman and Robert Di Giovanni. Loskocinski testified that he used his 1965 white Oldsmobile with Connecticut plates as the getaway car in each of the robberies (148).

Following the Government's two accomplice witnesses, Irving David Markson, a cell-mate of Grafman and Robert Di Giovanni at the West Street Detention Center, testified concerning conversations with his two fellow prisoners in late July 1975. Specifically, Markson testified to a three-way conversation with Grafman and Di Giovanni in which the three prisoners discussed the charges which had brought each of them to West Street (195). Markson remarked to his cell-mates that robbing banks seemed to be a hard way to make a living, to which, according to Markson, Robert Di Giovanni replied "Yes, but the money's good" (195). Markson, an Englishman, expressed interest in the bank robbery techniques employed by his American cell-mates; in response Robert Di Giovanni stated that his role was to vault the tellers' counter (195) and that he and Grafman used a getaway driver (196). Grafman stated that his role was to hold a gun on the people in the bank (196). Markson went on to describe a second conversation with Robert Di Giovanni alone in which the appellant mentioned spending $6,000 of bank robbery proceeds furnishing an apartment to impress a girl (197-198).

After Markson, Joanne Pellegrino testified that she stayed in Sonia Karakitis' apartment for a few days at the end of July 1975 (237) and related that at the time of her visit Robert Di Giovanni was also living in the apartment with Sonia (239). Pellegrino testified that on one Thursday (July 24, 1975, the day of the Chase robbery, was a Thursday) while she was at the apartment with Sonia and the appellant Robert Di Giovanni, Michael Grafman and a "kid with blond hair" (Loskocinski, who testified shortly before, had blond hair) came to the apartment (240). Pellegrino also recalled seeing a gun (240). Pellegrino further testified that when she returned to the apartment at the end of the day, she observed the appellant Di Giovanni and Sonia counting stacks of money on the bed and that the money, once counted, was placed in a single stack approximately three inches thick (242-243).

At the beginning of the third day of trial, before the testimony of several agents of the Federal Bureau of Investigation, the Government indicated that it would offer testimony concerning statements made by appellant Di Giovanni following his arrest and various items of evidence taken from Sonia Karakitis' apartment in a consent search (256-257). The colloquy on this subject reflects that the Government had advised appellant's counsel of its intentions in this respect in October and that no motion to suppress had been made before the trial (256, 257, 265). The Government accordingly argued under Rule 12(f) of the Rules of Criminal Procedure that a suppression motion was not timely (257). Nonetheless, Judge Costantino ordered a suppression hearing outside the jury's presence before resuming the trial. At the hearing two agents of the Federal Bureau of Inevstigation testified. Agent Robert Johnson testified concerning the *Miranda* warnings given to Robert Di Giovanni following his arrest (269). Agent Bruce Brot-

man testified as to an oral consent to search given by Sonia Karakitis (273) and a written consent form signed by her (274), which was marked for identification (275). Following Agent Brotman's testimony the Government offered to make Sonia Karakitis available as a defense witness on the consent search issue, but appellant's counsel declined the offer (276). The Court denied the suppression motions (276).

Trial testimony resumed with Special Agent Michael McHale. Agent McHale testified as to his obtaining sneaker prints from the top of the tellers' counter following the Atlas robbery (279) and a rubber "lift" or impression of one of the sneaker prints was received in evidence (281). Next Special Agent Bryant Corliss described the arrest of Stanley Loskocinski. Bait bills from the Chase robbery taken from Loskocinski's person at the time of his arrest were received in evidence under a limiting instruction from the Court (295). Agent Robert Johnson then described his post-arrest interview of Robert Di Giovanni. During the interview the appellant told Agent Johnson that he was living in an apartment with a girl named Sonia (295). The appellant also admitted that he owned a pair of blue suede sneakers which were in the apartment (295-296). After describing this interview Agent Johnson also identified a brown cloth work glove found in Loskocinski's car (297).

The Government's last witnesses was Detective Donald Palmer of New York City's Major Case Squad. Detective Palmer testified as to his participation in the search of Sonia Karakitis' apartment. Through Detective Palmer the following items from the apartment were offered and received in evidence: (1) blue suede sneakers matching those in the surveillance photographs of the robber vaulting the tellers' counter in the Atlas robbery and whose treads matched the sneaker print "lift" taken by Agent

McHale; (2) a dark brown stocking mask found on a bedside table; (3) from the same table, a pair of brown cloth work gloves matching the glove from Loskocinski's car and the gloves appearing on the hands of the robber covering the banking floor in the surveillance photograph of the Chase robbery; (4) a light gray Nazareth College sweatshirt appearing to match the sweatshirt worn by one of the robbers in the same surveillance photograph and; (5) invoices for clothing and furniture totalling more than $5,000 (311-315).

Following Detective Palmer's testimony both the Government and appellant rested (319). After the summations and the Court's charge, the jury deliberated and returned a guilty verdict against appellant Di Giovanni on each of the two counts of the indictment which were the subject of the trial.

2. Proceeding before second trial

Prior to the second trial two indictments relating to the NBNA robbery were consolidated: the initial indictment (75 Cr. 608) covering Michael Grafman, Robert Di Giovanni and Michael Sadowski (the three alleged participants in the robbery inside the bank) and a later indictment (76 Cr. 632) covering Patrick Dougherty (the alleged getway driver in the NBNA robbery) (3).

Prior to jury selection, the Government showed all anticipated exhibits to defense counsel (3). No objection was made to any particular exhibit, although Robert Di Giovanni's attorney moved to suppress all material obtained in the search of Sonia Karakitis' apartment (9).

[*] The pretrial proceedings are recorded in the transcript of the second trial and page references are to that transcript.

The Government stated its willingness to relitigate that issue (11) but again relied on Rule 12(f) to require that any suppression hearing be held prior to trial (4). The Court ruled that any suppression hearing must be conducted before the impaneling of the jury (4). Following this ruling none of the defendants requested a suppression hearing as to the consent search.

The only pre-trial hearing requested or held was a brief *Simmons* hearing requested by the appellant Sadowski (4). At the conclusion of the *Simmons* hearing, following the witness' repudiation of his earlier photographic identification (28) and his total failure to make in-court identification (31), the Government indicated that it had no intention of using the witness for identification (32).

The Second Trial

At the outset of the trial NBNA's head teller, Corinne Manning, testified that two robbers wearing brown stocking masks carried out the robbery behind the tellers' counter (44), while a third robber, carrying a shotgun and holding his jacket lapel over his face, covered the banking floor (45). Mrs. Manning identified a bank surveillance photograph, which was received in evidence, showing the three robbers in the course of the robbery (48). A bystander on the street, Steven Maesano, then identified two stocking masks discarded by the fleeing robbers (55) and described the entry of the three robbers into a blue getaway car (54) driven by a fourth person (90, 91).[4]

[4] Maesano also misidentified (as later stipulated by the Government) the defendant Patrick Dougherty as one of the robbers who ran from the bank to the waiting getaway car (56).

Following the bank witness and street bystander Michael Grafman took the stand. Grafman admitted committing four bank robberies including the NBNA robbery (104) and identified the three defendants on trial as his accomplices in the latter robbery (108). Grafman described planning sessions with his three accomplices (116) and partially successful attempts to obtain ammunition for three weapons, a .32 caliber pistol, a .45 caliber revolver and a sawed off shotgun furnished by appellant Sadowski (117-121). Grafman described appellant Sadowski's introduction of Di Giovanni and Grafman to a proposed fourth member of the bank robbery team named "Coco" (123-124). Grafman also described the casing of the bank before the robbery (125).

Grafman testified that on the day of the robbery Coco failed to appear (127) and Patrick Dougherty, taking Coco's place as the fourth man, drove the getaway car (131). Once inside the bank on the day of the robbery, Grafman related that he and Di Giovanni went over opposite ends of the tellers' counter while appellant Sadowski covered the banking floor with the sawed off shotgun (134-136). Grafman also described his receipt of a share of the robbery proceeds brought to his house by Robert Di Giovanni in a juice carton later in the day (145).

Grafman also testified that "a couple of days" before his arrest on July 25, he received a telephone call from Michael Sadowski from Florida, that they discussed committing another bank robbery and that Sadowski gave him his Florida telephone number (305-932-1535) (198-207). Grafman went on to state that before his arrest he placed a second call to Sadowski at the Florida number (201-202) and again discussed the proposed bank robbery

with Sadowski (204).[5] Finally, Grafman identified a photograph of a .45 caliber Smtih & Wesson revolver as the handgun displayed at planning sessions prior to the NBNA robbery (210).

Following Grafman's direct examination, the next two and a half trial days were consumed by cross-examination of that witness (215-577). One full trial day and a part of two others were used by Mr. Sadowski's counsel (233-539). Appellant Sadowski's attorney elicited Grafman's and Robert Di Giovanni's involvement in four robberies, including the NBNA robbery, and elicited from Grafman the admission that Michael Sadowski participated in the NBNA robbery alone. Appellant Di Giovanni's counsel made no objection to this testimony implicating his client in other robberies until the third day of Grafman's cross-examination (545). Judge Costantino stated that he had been waiting for an objection to that line of questioning (545) and later expressed surprise at the lack of objections on behalf of appellant Di Giovanni (583). Counsel for Mr. Di Giovanni claimed that he understood there was a standing objection by him to such cross-examination (583).[6]

The Government next called Sheri Lessner, a cocktail waitress from Miami Beach (615). Miss Lessner testified that she met Michael Sadowski in Florida in early

[5] On cross-examination appellant Sadowski introduced telephone toll records establishing that a phone call was in fact made from Grafman's house to that number in Florida on July 25 (507-508).

[6] Appellants' briefs supply no page reference for the claimed standing objection and the Government has searched the record in vain for any such objection. Indeed, the only standing objection in the trial was one shared by both appellants Di Giovanni and Sadowski to testimony by Grafman on direct examination as to his phone conversations with appellant Sadowski (202).

July 1975 and that Mr. Sadowski took her and two friends to dinner (617-618). Miss Lessner related that appellant Sadowski paid for the dinner with a large bill which he took from a stack of bills approximately three-quarters of an inch thick [*Ibid.*]. She further testified that Mr. Sadowski subsequently stayed at her apartment in the Miami Beach area and that her telephone number at the apartment was 305-932-1535.

After a high-school student, Alex Guerrieri, testified concerning the license plate number of the getaway car (622-626), "Coco" Torres testified that at the end of June or beginning of July he received a call from his friend Michael Sadowski (638). "Coco" Torres related that this phone call led to a discussion among Michael Sadowski, "Bobby" (whom Torres identified in court as the appellant Robert Di Giovanni), another individual named Michael and himself concerning a proposed robbery of a bank in the vicinity of Kings Highway and McDonald Avenue (the location of the bank involved in the NBNA robbery as shown on a street map previously admitted in evidence) (639-647). Torres related that he agreed to participate in the robbery (646) and then finally backed out before the robbery (647).

Irving David Markson again testified to his three-way conversation with Di Giovanni and Grafman (751-752) and to his second conversation with appellant Di Giovanni alone (753).

Next, the Government called Sonia Karakitis, who testified that Robert Di Giovanni moved in to her apartment in July 1975 (816). She recalled that her phone number was 438-4004. Karakitis testified that on one occasion appellant Di Giovanni, while on the telephone, dictated to her Michael Sadowski's name and a Florida

telephone number which she wrote down on a Con Edison envelope as it was dictated by appellant Di Giovanni (834). The Con-Ed envelope bearing these notatios (including Michael Sadowski's name and Sheri Lessner's number) was received in evidence. Miss Karakitis further related that on one occasion Robert Di Giovanni asked her to produce the Con Ed envelope and then dialed the Florida number (837). She recalled appellant asked for "Mike" (838) and went on to describe her recollection of what appellant Di Giovanni said in the ensuing conversation (839-842). At one point she recalled hearing appellant Di Giovanni say that the "sawed-off shotgun was lost." (842). On cross-examination Karakitis admitted absconding with a car rented by her under a false name and driver's license (865-867) and admitted casing one bank with Robert Di Giovanni after July 2, 1975 (908-909). In each case further exploration of these self-incriminating admissions was foreclosed when the witness invoked the Fifth Amendment following a warning by the Court of her privilege against self-incrimination. On cross-examination Karakitis also testified that she signed a consent to search form (879) and gave oral permission to search her apartment (*Ibid*). No attorney questioned her as to the voluntariness of that consent or moved to suppress the fruits of the search on the basis of her testimony. Motions by all defendants to strike Karakitis' testimony because of her invocation of the Fifth Amendment were denied (872).

Following Miss Karakitis an employee of the New York Telephone Company testified as to toll records for Sonia Karakitis' telephone showing a call on July 25, 1975 to Sheri Lessner's number in Florida.

Special Agent Edward J. Putz of the Federal Bureau of Investigation then testified as to the arrest of Michael

Sadowski in Sheri Lessner's apartment on July 26 (989). At the time of his arrest appellant Sadowski admitted having phone conversations with both Di Giovanni and Grafman from Miami (996). Through Agent Putz pages of appellant Sadowski's address book were received in evidence showing telephone numbers for all of the defendants and a notation as to a .45 Smith and Wesson revolver on the same page as the defendant Dougherty's telephone number (1017).

Through Special Agent Bruce Brotman a post-arrest photograph of appellant Sadowski was received in evidence showing a hair style and facial features closely resembling the partially covered face of the robber holding the shotgun in the NBNA robbery as shown in the surveillance photograph previously admitted in evidence (1070-1071). The record indicates that appellant Sadowski's hairstyle at the time of trial was markedly different from either the post-arrest or surveillance photograph (1069).

Following a final FBI witness, the Government and all of the defendants rested (1122-1123, 1142).

Following summations (1164-1250), Judge Costantino charged the Jury (1255-1278), including a limiting instruction as to evidence of similar acts (1271-1272) previously discussed in detail with counsel (1155-1160).

The jury deliberated and returned a guilty verdict against appellants Di Giovanni and Sadowski on the Section 2113(d) count and indicated that they were as yet unable to reach a decision as to the defendant Dougherty (1287). After further deliberations defendant Dougherty was acquitted (1289).

ARGUMENT

POINT I

In the first trial the Atlas robbery and the Chase robbery were properly joined.

Rule 8(a) of the Federal Rules of Criminal Procedure provides for the joinder of offenses in the following language:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more transactions connected together or constituting parts of a common scheme or plan.

The particular facts of the first trial are squarely appropriate for application of Rule 8(a). Di Giovanni was on trial for two bank robberies committed within six days of each other. The *modus operandi* of the robberies of July 18 and July 24, 1975 was identical, the defendants were identical, and the minor discrepancies in the preparation for the two jobs as stated in Di Giovanni's brief (at pg. 11) were merly distinctions without a difference. See *United States* v. *Begun*, 446 F.2d 32 (9th Cir. 1971).

"[A]n important factor in determining whether prejudice exists [in the joinder of offenses] is . . . 'whether the evidence of one of the crimes would be admissible in a separate trial for the other crime'." *United States* v. *Begun*, *supra*, at 33, citing *Bayless* v. *United States*, 381 F.2d 67, 72 (9th Cir. 1967). It is clear

from the facts of the first trial that evidence of one robbery would have been admissible as evidence in a separate trial under Rule 404(b) of the Federal Rules of Evidence, for example to show identity or the existence of a common scheme or plan. See *Spencer* v. *State of Texas*, 385 U.S. 554, 560-562 (1967); *Bayless* v. *United States*, *supra*, at 71-72 (9th Cir. 1967).

The Government submits that appellant Di Giovanni has failed to meet his heavy burden to establish either a basis for mistrial due to a misjoinder of offenses or that the trial judge abused his discretion in refusing severance. Appellant must demonstrate substantial prejudice. *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir. 1975), *cert. denied*, 421 U.S. 950; *United States* v. *Begun*, *supra*; *United States* v. *Adams*, 434 F.2d 756 (2d Cir. 1970). Appellant Di Giovanni has, in effect, presented a general claim of prejudice which cannot be supported by the facts of the case and which is insufficient to warrant severance. *Williamson* v. *United States*, 310 F.2d 192, 197 (9th Cir. 1962); *United States* v. *Braasch*, 505 F.2d 139, 150 (7th Cir. 1974), *cert. denied*, 421 U.S. 910.

The cases cited by appellant are plainly distinguishable. In *United States* v. *Carter*, 475 F.2d 349 (D.C. Cir. 1973), the Government lumped together in a single trial a gas station robbery by one robber, an assault by an armed man (involving no robbery) and a robbery by two robbers in a parking lot of a restaurant. The three events took place on separate dates and the link among the events was fur clothing worn by one of the perpetrators. In *Drew* v. *United States*, 331 F.2d 85, 92 (D.C. Cir. 1964), the Government joined an armed robbery case with a pathetic attempted robbery (without a weapon or any threat of violence) some two and one half weeks later.

POINT II

In the second trial all alleged participants in a single bank robbery were properly joined for trial.

Appellants contend that the Government should have conducted separate trials of the alleged participants in the NBNA robbery.

In *United States* v. *Borelli*, 435 F.2d 500 (2d Cir. 1970), *cert. denied*, 401 U.S. 946, the Court of Appeals recited the

> general rule . . . that persons jointly indicted should be tried together "where the indictment charges . . . a crime which may be proved against all the defendants by the same evidence and which results from the same or similar series of acts." At 502, quoting *United States* v. *Kahaner*, 203 F. Supp. 78-81 (S.D.N.Y. 1962), aff'd, 317 F.2d 459 (2d Cir. 1962), *cert. denied*, 375 U.S. 836 (1963).

Under *Borelli* and Rule 8(b) of the Federal Rules of Criminal Procedure a heavy burden is on the appellants to demonstrate prejudicial joinder, *see United States* v. *Finkelstein*, 526 F.2d 517, 525 (2d Cir. 1975), and granting or denying severance is within the sound discretion of the trial judge. *United States* v. *Cohen*, 518 F.2d 727 (2d Cir. 1975); *United States* v. *Sperling*, 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied*, 420 U.S. 962.

In the case at bar both appellants claim prejudice from their joinder in a single trial. Appellant Sadowski claims that his defense and particularly his cross-examination of Michael Grafman were circumscribed. This contention is simply ludicrous on a reading of the rec-

ord. Appellant Sadowski brought out the participation of Michael Grafman in other robberies in nearly endless detail and in the case of each of the other robberies, without objection from any attorney, elicited from Grafman that Robert Di Giovanni was one of his accomplices.

Due to the failure by co-counsel to object, the major curtailment of cross-examination of government witnesses feared by appellant Sadowski simply did not take place. The minimal restraints imposed by the court on appellant Sadowski are not error, for it is well understood that the admission of evidence on cross-examination is a matter within the discretion of the trial judge. *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975). Here, as in *Pacelli*, the government witness' criminal and other ignominious activity were clearly brought out to the jury for its inspection. Further investigation by counsel for Sadowski into areas not even relating to Sadowski, for the purposes of impeachment, would have been a fruitless exercise, would have prolonged the trial unnecessarily, and would have unfairly prejudiced appellant Di Giovanni. The trial judge acted completely reasonably and in his discretion in restricting counsel from delving further into collateral matters of credibility.

The record shows that appellant Di Giovanni's counsel chose* not to object co-counsel's cross-examination for

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* The record does not show any "standing objection" by appellant Di Giovanni's counsel (See *Statement of Facts*, p. 9). In the extensive colloquy on this issue Judge Costantino repeatedly indicated that he would make rulings on the scope of cross-examination at the time the testimony was elicited from the witness and not in advance (70, 176, 181; GA 12, 21 and 23).

considered strategic reasons in order to avoid focusing attention on his client in the eyes of the jury (181 and 184; GA 23 and 26). Moreover, appellant Di Giovanni's counsel showed no interest in the Government's repeated suggestions that the witness could be instructed by the Court to avoid bringing out Robert Di Giovanni's name in response to cross-examination (62, 74, 190; GA 4, 16, 32). Indeed, appellant Di Giovanni's counsel dismissed the suggestion of a limiting instruction to avoid references to his client as an effort "to tailor a witness' testimony." (181, 183; GA 23 and 25). In one instance, after appellant Di Giovanni's counsel rejected giving advance limiting instructions to the witness, the Court offered to give a cautionary jury instruction drafted by appellant Di Giovanni's counsel (183; GA 25). Appellant Di Giovanni's counsel showed equal lack of interest in submitting a proposed cautionary instruction to the Court (184; GA 26).

In short appellant Di Giovanni seeks the best of both worlds. By choosing not to make objections and expressly rejecting either limiting instructions to the witness or cautionary instructions to the jury, appellant sought the strategic advantage at trial of not focusing attention on his client. Now on appeal, appellant Di Giovanni seeks to reverse the trial judge for not taking the actions which for strategic reasons he did not seek.

Finally, the extreme cases cited by the appellants to justify a severance are simply not in point: *De Luna* v. *United States*, 308 F.2d 140 (5th Cir. 1962) (Defense counsel commenting on failure of co-defendant to take the stand); *United States* v. *Johnson*, 478 F.2d 1129 (5th Cir. 1973) (Confession of one co-defendant directly incriminating the other defendant). In a case closely in point, however, the Fourth Circuit refused to upset the trial court's refusal to grant a severance.

United States v. *White*, 482 F.2d 485, 488 (4th Cir. 1973), *cert. denied*, 415 U.S. 949. There, the Fourth Circuit held that the defendant was not entitled to have his trial severed from the trial of other alleged participants in a bank robbery. There, as here, there were no confessions by one co-defendant implicating another defendant. There, as here, the undisputed testimony established the commission of a bank robbery by four individuals and no defendant sought to escape conviction by establishing that one of the other defendants, rather than himself, had committed the crime.

In the case at bar the Government's proof showed that Grafman and Di Giovanni were the principal actors in the NBNA robbery and the undisputed evidence showed that in the course of the robbery they vaulted opposite ends of the tellers' counter to empty cash drawers behind the counter. The Government's undisputed evidence further showed that a third man, allegedly Michael Sadowski, covered the banking floor with a sawed-off shotgun. Thus, the issue in the case as far as appellant Sadowski was concerned, was whether the third man on the banking floor was Sadowski or someone else. There was no effort on appellant Sadowski's part at trial to show that the man with the sawed-off shotgun was either Grafman or Di Giovanni. Appellant Sadowski's theory was that someone (other than himself, Grafman or Di Giovanni) was the third man selected by the two other robbers to be their accomplice (GA 33). Therefore, logically viewed, appellant Sadowski's insistence on cross examining Grafman concerning his relationship with Di Giovanni in other robberies, where concededely only two robbers entered the bank, could not in any way advance appellant Sadowski's principal contention, i.e. that he was not the third man in the NBNA robbery. The Government submits that appellant Sadowski's extensive cross examination concerning these other robberies may be more realistically viewed as a tactical effort to draw the jury's attention away from the NBNA robbery.

Similarly, appellant Di Giovanni's defense made no effort to switch the blame to another defendant. Indeed, in the first trial appellant Di Giovanni attempted to transfer the mantle of guilt from himself to someone named "Joey" (115, 126). In the second trial appellant Di Giovanni suggested no theory as to who, other than himself, was behind the tellers' counter with Grafman.

POINT III

The district court properly admitted testimony as to discussions by appellant Sadowski of a subsequent planned bank robbery.

Appellant Sadowski contends that it was error to admit testimony as to telephone conversations (occurring several weeks after the date of the NBNA robbery) in which appellant Sadowski discussed the planning of a second bank robbery.

It is settled that evidence of other crimes is admissible if relevant for a purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value. *United States* v. *Papadakis, supra,* 510 F.2d 287, 294, *citing United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). See also Rule 404(b) of the Federal Rules of Criminal Procedure. The trial judge has wide discretion in determining whether to admit such evidence under 404(b). *United States* v. *Dwyer and Dobranski* Slip Op. Nos. 1124, 1255 (2d Cir., decided July 26, 1976); *United States* v. *Kaplan*, 416 F.2d 103 (2d Cir. 1969); *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965)).

A subsequent similar act may involve conversations as well as other forms of conduct. *United States* v. *Miranda*, 526 F.2d 1319 (2d Cir. 1975) is directly on

point. In *Miranda* appellant contended it was error to admit testimony as to conversations between Miranda, an informant, and a government agent, relating to narcotics subsequent to when the transaction charged in the indictment was consummated. This Court rejected the contention as having no merit, citing *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). The conversations involving a subsequent bank robbery were clearly probative in further showing Sadowski's motive, criminal intent and knowledge of and membership in, the bank robbery conspiracy.

The case at bar is wholly different from *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973), cited by appellant Sadowski, where the Government introduced sensational and inflammatory evidence entirely unrelated to the appellant (a suitcase of foul smelling hashish). Here the later subsequent similar act testimony involved discussions by the appellants themselves of a crime identical to that charged in the indictment.

Finally, after detailed discussion with counsel (GA 42-49), the Court, in its charge, gave a full limiting instruction as to the use of similar act evidence by the jury under Rule 404(b) (JA 22-31).[*]

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[*] Appellants' criticism of the lack of a cautionary instruction at the time the similar act evidence was introduced is particularly ill-founded, since no limiting instructions were requested by appellants. See *United States* v. *Papadakis*, *supra*, 510 F.2d at 295.

POINT IV

The trial court properly admitted Markson's testimony concerning (a) the conversation among Markson, appellant Di Giovani and Michael Grafman and (b) the conversation between Markson and appellant Di Giovanni.

Appellant Di Giovanni cites no authority for his proposition that *two* conversations involving Government witness Irving David Markson in which he was an active participant were inadmissible. Statements by Di Giovanni in both conversations were clearly proper evidence as direct admissions. Federal Rules of Evidence, Rule 801(d)(2)(A). Statements by Grafman in the three-way conversation were also admissible as adoptive admissions. Federal Rules of Evidence, Rule 801(d)(2)(B).

Markson's testimony revealed that both Di Giovanni and Grafman were active participants in this three-way conversation, each avidly describing his role in robbing a bank. The circumstances of the conversation were such that a dissent by Di Giovanni would have been natural if he disagreed with whhat Grafman had to say. The private conversation in the case at bar in which the two robbers candidly described their bank robbery technique is a far cry from the statements involved in *United States* v. *Flecha*, Slip Op. No. 1059, — F.2d — (2d Cir. decided June 23, 1976) in which silence by the defendant plainly did not necessarily mean adoption of statements blurted out by another defendant after Customs agents had five suspects standing in a line. See also *United States* v. *Yates*, 524 F.2d 1282, 1285 (D.C. Cir. 1975); *United States* v. *Moore*, 522 F.2d 1068, 1075 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976).

POINT V

There was no withholding of evidence favorable to the accused in connection with the search of Sonia Karakitis' apartment.

It is settled that the Government may not withhold evidence favorable to the accused. *Brady* v. *Maryland*, 373 U.S. 83 (1963). However, as this Circuit has recently noted,

> The Government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony he might furnish. *United States* v. *Stewart*, 513 F.2d 957, 960 (2d Cir. 1975).

In the case at bar appellant Di Giovanni concedes that the Government offered to make Karakitis available as a defense witness on the issue of the consent search (Di Giovanni brief, p. 8). As indicated above, however, appellant Di Giovanni declined to take advantage of this offer (Statement of Facts, *supra* at 6). He cannot now be heard to complain.

Moreover, when Karakitis testified at the second trial, she in fact testified that she consented to the search (GA 37-41). No defense attorney elicited from her any statement that the consent was involuntary. Not surprisingly, following her testimony no motion was made to suppress the fruits of the search.

Furthermore, defense counsel was advised in October of 1975 that the Government would seek to introduce evidence taken from the Karakitis apartment. No motion

to suppress, however, was made until after the trial had commenced. The Government reiterates its position below that any attack on the voluntariness of the Karakitis consent should be barred as being untimely. Rule 12(f) Federal Rules of Criminal Procedure; *United States* v. *Mauro*, 507 F.2d802 (2d Cir. 1974).

POINT VI

The trial court was well within its discretion in refusing to strike the testimony of Sonia Karakitis in the second trial following her invocation of the Fifth Amendment as to collateral matters.

Appellant Sadowski seeks a reversal of his conviction because the trial court exercised its discretion in permitting Sonia Karakitis to assert her right against self-incrimination as to collateral matters and refused to strike Karakitis testimony.[9]

United States v. *Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 822, states the applicable test:

> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the wit-

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[9] Appellant Sadowski's brief (p. 18) erroneously suggests that Karakitis' testimony relating to events on July 2 was restricted. On the contrary, the only restriction pertained to an entirely unrelated auto theft involving Karakitis and a separate bank robbery on July 17.

> ness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him.

The curtailment by the district court of further examination by counsel for Sadowski into such collateral matters as Sonia Karakitis' involvement in a car theft and an unrelated bank robbery do not warrant reversal under *Cardillo.* Moreover, the full value of these incidents for impeachment purposes was fully exploited by defense counsel before the witness invoked the Fifth Amendment. Appellant Sadowski has clearly failed to meet his heavy burden of establishing that the trial court abused its discretion in permitting Karakitis to assert her Fifth Amendment right against self-incrimination. *Alford* v. *United States*, 282 U.S. 687 (1931); *United States* v. *Cardillo*, 316 F.2d 606, 611 (2d Cir. 1963), *cert. denied*, 375 U.S. 822. Moreover, Sadowski can hardly claim that he was prejudiced by the fact that a witness who only peripherally implicated him claimed her Fifth Amendment privilege.

POINT VII

Remarks by the Assistant United States Attorney in summation as to the nature and extent of cros-examination of Government witnesses was fair comment.

Finally, appellant Sadowski claims that it was "major" error for the prosecutor, in his summation to comment on the nature, and in some cases the lack, of cross-examination of Government witnesses. In so doing,

Sadowski advances the startling proposition that the Government may not comment on the failure by defense counsel to cross-examine a particular government witness or on the avoidance by defense counsel of certain issues on cross-examination. The argument is totally without merit. This Court has consistently in the past refused to equate such conduct with commenting on the defendant's failure to take the stand. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050.

> [W]here the prosecutor confines himself to arguing the strength of his case b stressing the credibility and iack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them. At 1270.

See Baker v. *United States*, 115 F.2d 533, 544 (8th Cir. 1940), *cert. denied*, 312 U.S. 692 (1941). The remarks were hardly error; indeed, they were fair comment. In addition they were made with respect to the testimony of individuals who were not the Government's major witnesses in a case where the evidence of guilt was strong.

CONCLUSION

The judgments of conviction against appellants Sadowski and Di Giovanni should be affirmed in all respects.

Respectfully submitted,

Dated: August 30, 1976

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
RICHARD W. BREWSTER,
Assistant United States Attorneys,
Of Counsel.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA	:	
Appellee,	:	
-v-	:	Docket No. 76-1097
MICHAEL SADOWSKI,	:	
Appellant.	:	

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CERTIFICATE OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

I certify that on July 19th, 1976, I mailed a copy of the following to David Trager, Esq., United States Attorney for the Eastern District of New York, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York: (1) Brief for Appellant Michael Sadowski; (2) Brief for Appellant Robert DiGiovanni; and (3) Joint Appendix for Appellants Michael Sadowski and Robert DiGiovanni.

Donald E. Nawi

DONALD E. NAWI, ESQ.
Attorney for Appellant
Michael Sadowski